

For the Northern District of California

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9 U.A. LOCAL 342 JOINT LABOR -  
10 MANAGEMENT COMMITTEE, et  
al.,

No. C-04- 2531 SBA (WDB)  
No. C-05-1758 SBA (WDB)

11 Plaintiffs,

12 v.

13 AIRTEKS MECHANICAL  
14 SERVICES, INC., a California  
15 Corporation, and JEROME  
16 BOHLAND,

17 Defendants.

18 \_\_\_\_\_ /  
19 **REPORT AND  
RECOMMENDATION RE  
PLAINTIFFS' CONSOLIDATED  
MOTIONS FOR DEFAULT  
JUDGMENT**

20 and related case  
21 \_\_\_\_\_ /

22 Plaintiffs are U.A. Local 342 of the United Association of Journeymen and  
23 Apprentices of the Plumbing and Pipe Fitting Industry (“union”), various fringe  
24 benefit trust funds established for the benefit of union members, and the trustee of  
25 those fringe benefit trust funds. *See*, Complaint, filed June 24, 2004, and First  
26 Amended Complaint (“FAC”), filed December 22, 2004, in C04-2531; Complaint,  
27 filed April 27, 2005, in C05-1758. Defendant, Airteks Mechanical Services, Inc.,  
28 is bound by a collective bargaining agreement and various trust agreements to  
make timely contributions to plaintiff trust funds for covered work performed by  
Airteks employees. Declaration of Larry Blevins in Support of Motion for

1 Default Judgment, filed in C05-1758 SBA on August 8, 2005, ("Blevins Decl.") at  
 2 ¶4 and Ex. A and D. Defendant Jerome Bohland is an individual and an  
 3 authorized representative of Airteks. Blevins Decl., at Ex. D.

4 On June 24, 2004, plaintiffs filed a complaint against Airteks seeking to  
 5 collect unpaid contributions due to multi-employer benefit plans and to obtain  
 6 monthly reports pursuant to the governing collective bargaining agreement. See,  
 7 Complaint, C04-2531 SBA. On December 22, 2004, plaintiffs filed a First  
 8 Amended Complaint in Civil Action C04-2531 SBA, containing essentially the  
 9 same allegations and adding Mr. Bohland as a defendant.

10 On April 27, 2005, plaintiffs filed a separate complaint commencing a new  
 11 action, C05-1758 SBA.<sup>1</sup> The 2005 complaint alleges that Airteks and Mr.  
 12 Bohland refuse to submit to an audit as required by the collective bargaining  
 13 agreement, asks the Court to compel defendants to comply with such an audit, and  
 14 seeks a judgment for amounts found owing at the conclusion of the audit.  
 15 Complaint C05-1758, at ¶9.<sup>2</sup>

16 Plaintiffs served defendants with a copy of each complaint. Summons and  
 17 Proofs of Service, filed in C04-2531 on July 28, 2004 and February 7, 2005;  
 18 Summons and Proof of Service, filed in C05-1758 on May 30, 2005. Defendants  
 19 have not responded to any of the complaints.

20 In response to plaintiffs' applications for entry of default, the Clerk of the  
 21 Court entered default as to Airteks with respect to Civil Action C04-2531 on April  
 22 25, 2005, and entered default as to Airteks with respect to Civil Action C05-1758  
 23 on July 5, 2005.

24  
 25 \_\_\_\_\_  
 26 <sup>1</sup>This action originally was assigned to Judge White. Eventually, however, the 2004 and  
 27 2005 actions were related and C05-1758 was reassigned to Judge Armstrong.

28 <sup>2</sup>For clarity, our citations to the record will include the case number for the action in  
 which the cited document was filed.

1           As we read it, plaintiffs' application for entry of default in Civil Action  
 2 C04-2531 seeks entry of default only as to Airteks. Appropriately, the Clerk  
 3 entered default only as to Airteks. In contrast, in their application for entry of  
 4 default in Civil Action C05-1758 plaintiffs also requested default against Mr.  
 5 Bohland. However, apparently as a result of administrative oversight, the Clerk  
 6 has not entered default as to Mr. Bohland in the 2005 action.

7           Plaintiffs filed and served a motion for default judgment in each action.  
 8 See, Motion for Default Judgment and Proof of Service, filed in C04-2531 on  
 9 September 16, 2005; Motion for Default Judgment and Proof of Service, filed in  
 10 C05-1758 on August 8, 2005. Judge White referred plaintiffs' August 8th motion  
 11 to the undersigned. On November 15, 2005, Judge Armstrong ruled that the two  
 12 actions were related. She then referred plaintiffs' September 16th motion to the  
 13 undersigned. Order Referring Motion, filed November 28, 2005.

14           On December 1, 2005, this court ordered plaintiffs to file a consolidated  
 15 memorandum of points and authorities, *inter alia*, addressing all of the relief  
 16 sought via both actions. Order re Related Motions for Default Judgment. On  
 17 December 23, 2005, plaintiffs filed their Consolidated Points and Authorities in  
 18 Support of Motion for Default Judgment (hereafter "Consolidated Motion") and  
 19 additional supporting papers.

20           On January 18, 2006, this court conducted a hearing in connection with  
 21 plaintiffs' Consolidated Motion. No appearance was made on defendants' behalf.<sup>3</sup>

22           In their Consolidated Motion, plaintiffs seek a judgment against Airteks and  
 23 Mr. Bohland in the amount \$30,685.58 to recover unpaid contributions, liquidated  
 24 damages, interest, attorneys' fees and costs. Plaintiffs also seek an order

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 26           <sup>3</sup>Before the District Court related these cases, the undersigned also conducted a hearing  
 27 on September 28, 2005, in C05-1758, in connection with plaintiff's August 8th motion for  
 28 default judgment. No appearance was made on defendants' behalf at the September 28th  
 hearing.

1 compelling defendants to produce monthly contribution reports, to submit to an  
2 audit of Airteks' payroll records, and to pay all additional amounts deemed owing  
3 by the auditor.

4

5 **I. Entitlement to Entry of Default Judgment**

6 Plaintiffs seek entry of judgment by default against the entity Airteks as  
7 well as against Mr. Bohland, individually. Consolidated Motion at 2, n.1.

8 Plaintiffs served Airteks with their motions for default judgment. See,  
9 Proof of Service, filed in C04-2531 on September 16, 2005; Proof of Service filed  
10 in C05-1758 on August 8, 2005; Proofs of Service filed in both actions on  
11 December 23, 2005; see also, Letter from plaintiffs' counsel, filed in C05-1758, on  
12 October 4, 2005. Airteks has failed to respond, and the Clerk of the Court entered  
13 default as to this defendant. Given Airtek's complete failure to appear and the  
14 significant risk of prejudice to the employee beneficiaries of the fringe benefit  
15 trusts when an employer fails to make the required contributions, the sufficiency  
16 of plaintiff's complaints, and the apparent merit of plaintiffs' substantive claims,  
17 we RECOMMEND that Judge Armstrong find that plaintiffs are entitled to  
18 judgment by default against Airteks Mechanical Services, Incorporated with  
19 respect to both actions. See, F.R.C.P. 55(b); *Eitel v. McCool*, 782 F.2d 1470 (9th  
20 Cir. 1986).

21 The Clerk has not, however, entered default against Mr. Bohland in either  
22 action. Therefore, we cannot recommend that Judge Armstrong enter judgment by  
23 default against Mr. Bohland, individually. Plaintiffs represented on the record  
24 that, at this juncture, they wish to proceed with their Consolidated Motion as  
25 against Airteks. See, Transcript January 18, 2006, hearing; Transcript September  
26 28, 2005, hearing in C05-1758. By proceeding with this Consolidated Motion as  
27 against the entity only, plaintiffs have not waived any entitlements they may have

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1 against Mr. Bohland individually. *Id.* We RECOMMEND that Judge Armstrong  
 2 permit plaintiffs to reapply to the Clerk for entry of default as to Mr. Bohland if  
 3 they choose, and if the Clerk enters default, to file a new consolidated motion for  
 4 default judgment directed to Mr. Bohland, individually, at a later date.

5 We further RECOMMEND that Judge Armstrong expressly find and direct  
 6 that it is appropriate to enter judgment against fewer than all defendants on the  
 7 ground that there is “no just reason for delay” where, as here, employee  
 8 beneficiaries of the fringe benefit trust funds may suffer irreparable damage if  
 9 plaintiffs are delayed or unable to collect delinquent contributions owed to the  
 10 funds and where Airteks and Mr. Bohland are likely to be one and the same.  
 11 F.R.C.P. 54(b).

12

13 **II. Specific Items of Relief Sought by Plaintiffs**

14 Section 1132(g)(2) of ERISA provides that in an action for delinquent  
 15 contributions

16 in which a judgment in favor of the plan is awarded the court *shall*  
 17 award the plan --  
 18 (A) the unpaid contributions,  
 19 (B) interest on the unpaid contributions,  
 20 (C) an amount equal to . . . (ii) liquidated damages provided for under the  
 21 plan in an amount not in excess of 20 percent . . . of the amount  
 22 determined by the court under subparagraph (A),  
 23 (D) reasonable attorneys' fees and costs of the action . . . , and  
 24 (E) such other legal or equitable relief as the court deems appropriate.

25 For purposes of this paragraph, interest on unpaid contributions shall  
 26 be determined by using the rate provided under the plan . . .

27 29 U.S.C. §1132(g)(2) emphasis added.

28

29 **A. Unpaid contributions**

30 Plaintiffs seek unpaid contributions known to be delinquent at this time in  
 31 the amount \$14,823.24, owing pursuant to the governing collective bargaining and  
 32 trust agreements. Consolidated Motion at 5; Declaration of Kim Biagi in Support

1 of Motion for Default Judgment, filed in C04-2531 on September 16, 2005,  
 2 (“Biagi Decl.”), at ¶3 and Ex. A.

3 Defendant Airteks is the signatory to a Master Labor Agreement between  
 4 the union and Airteks’ “bargaining agent,” Northern California Mechanical  
 5 Contractors Association. Blevins Decl., at Ex. A and D. The collective  
 6 bargaining agreement incorporates applicable Trust Agreements, and signatories  
 7 agree to be bound by the terms of those agreements. Blevins Decl., at Ex. A and  
 8 C. The collective bargaining agreement governs employer contributions to the  
 9 various employee fringe benefit trust funds and obligates employers to pay  
 10 specified amounts into employee benefit funds on behalf of Airteks’ employees  
 11 who perform covered work. *Id.*

12 Airteks became a signatory to the collective bargaining agreement on  
 13 February 20, 2002. Belvins Decl., at Ex. D. Airteks has not invoked the  
 14 procedures that would release it from its obligations under that agreement.  
 15 Blevins Decl., at ¶4 and Ex. D; Transcript January 18, 2006, hearing.  
 16 Accordingly, Airteks is obligated to pay contributions for covered work conducted  
 17 by its employees for the period February 20, 2002, through the present. *Id.*, at ¶4  
 18 and Ex. A, B, C, and D.

19 Plaintiffs seek a judgment for unpaid contributions known to be delinquent  
 20 at this time, in the amount \$14,823.24.<sup>4</sup> Consolidated Motion at 5; Biagi Decl., at  
 21 ¶3. According to plaintiffs, Airteks has not submitted monthly reports for the  
 22 months of June, August, November, and December of 2003. Biagi Decl., at ¶3;  
 23 Consolidated Motion at 9. However, based on earnings statements provided by an  
 24 Airteks’ employee, Gabriel Minor, plaintiffs have determined that defendant owes  
 25 at least \$14,823.24 for unpaid contributions for covered work done by Mr. Minor

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26  
 27 <sup>4</sup>Plaintiffs seek two categories of unpaid contributions in their Consolidated Motion: (1)  
 28 contributions that they have determined are delinquent at this time as a result of information  
 obtained from an Airteks’ employee and (2) contributions, if any, found to be delinquent as a  
 result of the requested audit. In this section we address only the former. We address the latter  
 in section II.C.1, *infra*.

1 in 2003. Biagi Decl., ¶3 and Ex. A. Because such damages are supported by the  
 2 evidence, we RECOMMEND that the District Court enter judgment against  
 3 Airteks in the amount \$14,823.24 for unpaid contributions known to be delinquent  
 4 at this time.

5 Plaintiffs request that the Court enter the monetary judgment in the name of  
 6 “UA Local 342 Joint Labor-Management Committee” (“JLM”) and assert that  
 7 JLM will distribute the amounts received pursuant to a “Joint Services  
 8 Agreement.” Consolidated Motion at n.4; Declaration of John L. Anderson in  
 9 Support of Consolidated Motion for Default Judgment, filed December 23, 2005  
 10 (“Anderson Decl.”). We have reviewed the evidence submitted by plaintiffs and  
 11 find that the Joint Services Agreement compels JLM to distribute monies received  
 12 as a result of a monetary judgment among the Trusts Funds in a particular order.  
 13 We RECOMMEND that the District Court enter judgment in the name of JLM and  
 14 order JLM to distribute the judgment pursuant to the terms of the Joint Services  
 15 Agreement.

16

17       **B. Interest and Liquidated Damages**

18 Plaintiffs seek interest and liquidated damages relating to the unpaid  
 19 contributions known to be delinquent at this time in the total amount \$5,424.63.  
 20 Consolidated Motion at 5; Biagi Decl., at ¶3.

21

22       **1. Interest**

23 If the Court enters judgment in plaintiffs’ favor for unpaid contributions,  
 24 ERISA requires the Court to award plaintiffs “interest on the unpaid  
 25 contributions.” 29 U.S.C. §1132(g)(2)(B).

26 Plaintiffs seek interest on the delinquent contributions at the rate of 12%.  
 27 Consolidated Motion at 3; FAC in C04-2531, at ¶11; Complaint in C05-1758, at  
 28 ¶10. Plaintiffs have submitted evidence that supports a finding that 12% is the

1 applicable interest rate under the Trust Agreements. Blevins Decl., at ¶6 and Ex.  
 2 C.<sup>5</sup>

3 ERISA provides that “interest on unpaid contributions shall be determined  
 4 by using the rate provided under the plan.” 29 U.S.C. §1132(g)(2). We, therefore,  
 5 RECOMMEND that the District Judge grant plaintiffs’ request for judgment for  
 6 interest on the unpaid contributions at the rate of 12% on delinquent contributions  
 7 from the date due through the date paid or, if as yet unpaid, through the date of  
 8 judgment.

9 Plaintiffs’ current interest calculation includes interest that has accrued  
 10 through August 20, 2005. Biagi Decl., at ¶3; Consolidated Motion at 5. In the  
 11 event Judge Armstrong adopts our recommendation, we also RECOMMEND that  
 12 the Court permit plaintiffs to file an additional submission calculating interest  
 13 through the date of judgment.

14

15 **2. Liquidated Damages**

16 Plaintiffs seek liquidated damages at the contract rate of 20%. Consolidated  
 17 Motion at 3; FAC in C04-2531 at ¶11; Complaint in C05-1758, at ¶10; Blevins  
 18 Decl., at ¶5 and Ex. C.

19 ERISA compels the court to award plaintiffs “liquidated damages provided  
 20 for under the plan in an amount not in excess of 20 percent . . . of the amount  
 21 determined by the court [as unpaid contributions].” 29 U.S.C. §1132(g)(2)(C)(ii).  
 22 Liquidated damages are “mandatory and not discretionary” if “the following three  
 23 requirements [are] satisfied: (1) the employer must be delinquent at the time the  
 24 action is filed; (2) the district court must enter a judgment against the employer;  
 25 and (3) the plan must provide for such an award.” *Northwest Administrators, Inc.*,

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26  
 27       <sup>5</sup>In support of their claims for interest and liquidated damages plaintiffs also reference a  
 28 document called “Joint Services Agreement.” Because defendant is not a signatory to this  
 document the rates for interest and liquidated damages therein cannot bind defendant. The rates  
 sought by plaintiffs are contained, nonetheless, in the Trust Agreements to which Airteks is  
 bound.

1       *v. Albertson's Inc.*, 104 F.3d 253 (9th Cir. 1996) citing *Idaho Plumbers &*  
 2       *Pipefitters v. United Mechanical Contractors, Inc.*, 875 F.2d 212 (9th Cir. 1989).

3           With respect to the first requirement -- whether the employer was delinquent  
 4       at the time the action is filed -- we note that plaintiffs have filed three complaints  
 5       in these related actions. Because the original complaint in C04-2351 named  
 6       Airteks as a defendant and because the 2004 and 2005 actions are essentially  
 7       identical, we RECOMMEND that Judge Armstrong find that the relevant  
 8       complaint for these purposes is the original complaint filed in C04-2531 on June  
 9       24, 2004.<sup>6</sup> Plaintiffs have submitted evidence that supports a finding that there  
 10       were contributions that were delinquent and unpaid at the time plaintiffs filed their  
 11       first lawsuit on June 24, 2004, and that the collective bargaining agreement  
 12       together with Trust Agreements provide for an award of liquidated damages on  
 13       such sums at the rate of 20% where, as here, plaintiffs have filed a lawsuit to  
 14       collect delinquent contributions. Biagi Decl., at 2; Blevins Decl., at ¶5 and Ex. A  
 15       and C. Therefore, plaintiffs have satisfied the first and third *Northwest*  
 16       requirements.

17           If Judge Armstrong adopts our recommendation to enter judgment against  
 18       Airteks for unpaid contributions in the amount \$14,823.24, plaintiffs will have  
 19       satisfied the second requirement.

20           We RECOMMEND that, if Judge Armstrong enters judgment against  
 21       Airteks for unpaid contributions known to be delinquent at this time, she also enter  
 22       judgment for liquidated damages in connection with the contributions that were  
 23       delinquent and unpaid as of June 24, 2004, the date plaintiffs filed lawsuit C04-  
 24       2531.<sup>7</sup>

25  
 26           

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 27       <sup>6</sup>We make no recommendation at this time with respect to whether the same date would  
 28       apply in a motion for default judgment against Mr. Bohland, individually, where, as here, Mr.  
 29       Bohland was not named as a defendant until December 22, 2004.

30           <sup>7</sup>Plaintiffs are entitled to liquidated damages on these amounts even if Airteks paid those  
 31       contributions after the lawsuit was filed. *Accord, Northwest*, 104 F.3d at 258.

### **3. Total Interest and Liquidated Damages on Unpaid Contributions**

For the reasons stated above, we RECOMMEND that the District Court enter judgment by default for interest on unpaid contributions known to be delinquent at this time at the rate of 12% through August 20, 2005, and liquidated damages relating to those unpaid contributions at the rate of 20% in the total amount \$5,424.63.

We also RECOMMEND that Judge Armstrong permit plaintiffs to submit supplemental information setting forth the amount of interest that has accrued through the present (or through the date of judgment).

**C. Request for Audit, Production of Monthly Reports, and Amounts Owing at Conclusion of Audit**

The collective bargaining agreement to which Airteks is a signatory governs employer contributions to the various employee fringe benefit trust funds and obligates employers to submit to the fringe benefit trust funds monthly reports documenting the number of hours worked by covered employees together with the monthly payments indicated as owing by each month's report. Blevins Decl., at Ex. A at 30. The governing Trust Agreements also obligate the employer to submit to an audit of its records for the purpose of determining whether the employer has paid the appropriate amount of contributions to the fringe benefit trusts. Blevins Decl., at ¶2 and Ex. C at 16-17.

Plaintiffs obtained documentation that at least one employee who was sent to Airteks out of the union hall performed covered work in 2003 for which Airteks did not submit reports or pay contributions. Biagi Decl., at ¶3 and Ex. A. Plaintiffs do not know whether covered work was performed for Airteks in 2004 and 2005. Airteks has submitted no reports for these years. Airteks has refused to

1 submit to an audit of its records as contemplated by the collective bargaining  
 2 agreement. Biagi Decl., at ¶ 3; Blevins Decl., at 5.

3 Airteks has breached the collective bargaining agreement by, *inter alia*,  
 4 failing to submit monthly reports documenting the hours worked by covered  
 5 employees and refusing to submit to an audit. Biagi Decl., at ¶ 3; Blevins Decl., at  
 6 5. Section 1132 of ERISA authorizes the Court to award “such legal and equitable  
 7 relief as the court deems appropriate.” 29 U.S.C. §1132(g)(2)(E). Airteks’ failure  
 8 to accurately report Mr. Minor’s work in 2003 supports plaintiffs’ concern that  
 9 Airteks may not have accurately reported covered work in other months and that  
 10 Airteks may be withholding information that would demonstrate that covered  
 11 work was completed in 2004 and/or 2005. We think this justifies an audit that  
 12 runs from February 20, 2002, the date Airteks became bound by the governing  
 13 collective bargaining agreement, through the present.

14 We RECOMMEND that Judge Armstrong enter judgment compelling  
 15 defendant Airteks to submit to an audit for the purpose of determining the amount  
 16 of fringe benefit contributions owed for the period from February 20, 2002,  
 17 through the present, and to provide relevant records requested by the auditor,  
 18 including, without limitation, Airteks’ monthly reports for June, August, November  
 19 and December 2003 and for 2004 and 2005.

20 Plaintiffs also ask the Court to compel Airteks to pay contributions, interest  
 21 and liquidated damages found owing as a result of the audit.

22

23 **1. Unpaid Contributions Found Owing at Conclusion of Audit**

24 Plaintiffs’ counsel represented that it is plaintiffs’ practice to have the  
 25 auditor send her full report in draft form to the employer. The employer will then  
 26 have thirty days to respond or to seek an extension of time in which to submit  
 27 additional documentation for the auditor’s consideration. When the auditor’s  
 28 process is complete, she will send a final report to the employer and to the Board of

1 Trustees, which is composed of union and employer representatives. The Board  
2 will provide Airteks with a second opportunity to present objections to the  
3 auditor's conclusions. The Board then votes on the report. Plaintiffs' counsel  
4 represented on the record that he would ensure that Airteks receives notice of the  
5 Board's proceedings. See, Transcript of January 18, 2006, hearing; Transcript of  
6 September 28, 2005, hearing.

7 We RECOMMEND that Judge Armstrong enter judgment for the amount of  
8 unpaid contributions found owing as a result of the audit on the condition that  
9 Airteks receives notice of the auditor's findings and an opportunity to respond at a  
10 proceeding before the Board.

11

## 12 **2. Interest Found Owing at Conclusion of the Audit**

13 For the reasons stated in section II.B.1 above, we RECOMMEND that the  
14 District Court find that plaintiffs are entitled to interest at the rate of 12% on  
15 unpaid contributions found owing at the conclusion of the audit from the date due  
16 until the date paid or until Court enters judgment on those amounts.

17

18

## 19 **3. Liquidated Damages on Delinquent Contributions Found 20 Owing from Audit**

21 Plaintiffs are entitled to mandatory liquidated damages under ERISA at the  
22 rate of 20% on contributions that were unpaid on June 24, 2004, (the date plaintiffs  
23 filed the first action). Absent the audit, plaintiffs cannot identify with certainty  
24 which, if any, of the remaining contributions were delinquent and unpaid as of June  
25 24, 2004.

26 For the purposes of determining whether plaintiffs are entitled to liquidated  
27 damages on contributions found delinquent as a result of the audit, and if so, the  
28 amount of any such liquidated damages, we group potentially delinquent

1 contributions into three categories: (1) contributions that had become delinquent  
 2 but that defendant paid before plaintiffs filed the first complaint, (2) contributions  
 3 that were both late and unpaid at the time that complaint was filed, and (3)  
 4 contributions that came due after that complaint was filed, became delinquent, and  
 5 either were paid late or remain unpaid.

6

7                   a.    **Liquidated Damages on Contributions That Were**  
 8                   **Delinquent and Unpaid at the Time Plaintiffs Filed the**  
 9                   **First Lawsuit**

10                  For the reasons stated in section II.B.2, we RECOMMEND that, if Judge  
 11 Armstrong enters judgment against Airteks for unpaid contributions found owing at  
 12 the conclusion of the audit, she also enter judgment for statutory liquidated  
 13 damages at the rate of 20% in connection with those contributions that were  
 14 delinquent and unpaid at the time plaintiffs first filed the lawsuit C04-2531 -- on  
 15 June 24, 2004.

16

17                   b.    **Liquidated Damages on Contributions That Became**  
 18                   **Delinquent after Plaintiffs Filed the First Lawsuit**

19                  The Ninth Circuit has not yet ruled with respect to whether plaintiffs can  
 20 recover statutory liquidated damages in connection with contributions that matured  
 21 after suit was filed where defendant was delinquent with respect to other  
 22 contributions at the time suit was filed. There has been a split among the lower  
 23 courts of this District on this issue.

24                  In *Board of Trustees v. Udovch*, 771 F.Supp. 1044 (N.D.Cal 1991), the  
 25 undersigned held that the Ninth Circuit's opinion in *Parkhurst v. Armstrong Steel*  
 26 *Erectors, Inc.*, 901 F.2d 796 (9th Cir. 1990), required the court to deny recovery of  
 27 statutory liquidated damages on contributions that had not matured at the time suit  
 28 was filed. We have since been persuaded by the reasoning set forth in *Board of*

1 *Trustees v. Bridon*, 1995 WL 573701 (N.D. Cal 1995), that it is impractical and  
2 counterproductive to apply rigidly *Parkhurst*'s broad statements to the  
3 circumstances before us, circumstances not considered by the Ninth Circuit in  
4 *Parkhurst*. Therefore, we RECOMMEND that Judge Armstrong follow cases such  
5 as *Bridon and Roofers Local Union No. 81 v. Wedge Roofing, Inc.*, 811 F.Supp.  
6 1398 (N.D.Cal. 1992), which adopt the more practical approach and award  
7 statutory liquidated damages at the rate of 20% on contributions that came due and  
8 became delinquent after plaintiffs filed their original complaint on June 24, 2004.

c. Liquidated Damages on Contributions That Became Delinquent but Were *Paid* Before Plaintiffs Filed the First Lawsuit

13        If Airteks was delinquent with respect to contributions but paid those  
14 contributions before plaintiffs filed the first complaint on June 24, 2004, plaintiffs  
15 are not entitled to statutory liquidated damages on those contributions. Plaintiffs  
16 might, however, be entitled to liquidated damages as a matter of contract. *Idaho*  
17 *Plumbers*, 875 F.2d at 217 (§1132(g)(2) does not preempt the federal common law  
18 of liquidated damages when that section does not apply); *Board of Trustees v.*  
19 *Udovch*, 771 F.Supp. 1044 (N.D. Cal 1991).

20 A contractual “liquidated damages provision is enforceable in this setting,  
21 and not void as a penalty, only if (1) ‘the harm caused by a breach [is] very difficult  
22 or impossible to estimate’ and (2) the fixed amount is ‘a reasonable forecast of just  
23 compensation for the harm caused.’” *Udovch*, 771 F.Supp. at 1048 citing *Idaho*  
24 *Plumbers*, 875 F.2d at 217.

25        We RECOMMEND that Judge Armstrong find that plaintiffs have satisfied  
26 the first prong of the test. As stated in *Udovch* “[w]hen an employer is delinquent  
27 in paying contributions into a fringe benefit trust fund, the fund suffers some kinds  
28 of harms that are very difficult to gauge.” 771 F. Supp. at 1049.

With respect to the second prong of the test, whether the fixed amount represents a reasonable forecast for the harm caused, we focus on the “parties’ intentions.” *Udovch*, 771 F. Supp. at 1048. The negotiating parties “must make a good faith attempt to set an amount equivalent to the damages they anticipate.” *Idaho Plumbers*, 875 F.2d at 217. For the reasons explained in *Udovch* we focus “on the character of the process that led, at the time the contract language was drafted, to the fixing of the liquidated damages figures or formulas.” 771 F.Supp. at 1048. We look for evidence that “the drafters made a good faith effort to determine that there would be a rational relationship between the damages that would be paid under the clause and the harms that would be suffered *in most of the situations that were reasonably foreseeable.*” 771 F. Supp. at 1049 (emphasis in original). More specifically, we look for evidence:

(1) that the drafters gave some thought to the kinds of harms that the liquidated damages provision would embrace, (2) that other more direct provisions were not made for compensation for at least the bulk of the harms intended to be so embraced, and (3) that it was not obvious, at the time of drafting, that the figure or formula selected would result, in a substantial percentage of instances in which it might be triggered, in amounts of money flowing from defendants to plaintiffs that clearly would be larger than necessary to compensate for the kinds of harms the plaintiffs were likely to in fact suffer.

*Udovch*, 771 F.Supp. at 1048. Plaintiffs may not receive contractual liquidated damages if such damages would constitute nothing more than a “penalty.”

Under the Trust Agreements, liquidated damages initially are charged at the rate of 10% of any unpaid amount or \$100.00, whichever is greater, plus interest. Blevins Decl., at Ex. C (Trust Agreement) at 14. The representative Trust Agreement submitted by plaintiffs identifies some kinds of harms that the liquidated damages would embrace, such as loss of return on investment, inability to pay benefits, and collection expenses, indicating that the drafters gave some thought to the kinds of harms the liquidated damages provisions would embrace. Blevins Decl., at Ex. C (Trust Agreement) at 14. Also, this provision of the Trust Agreement seems to cap liquidated damages at \$500.00 (presumably per

1 occurrence – *i.e.*, per month that contributions are delinquent). Blevins Decl., at  
2 Ex. C (Trust Agreement at 14-15) (“In no event, however, shall the liquidated  
3 damages exceed \$500.00.”). As we read the Agreement, this cap applies only until  
4 such time as plaintiffs find it necessary to file a legal action to collect the  
5 delinquency. This cap represents a reasonable attempt to limit liquidated damages  
6 during the period before the expense of trying to collect increases substantially  
7 with the initiation of litigation.

8 As a separate matter, we note that, as a general rule, full compensation  
9 requires payment of interest on the sums ‘lost.’ It follows that the provision for  
10 interest on liquidated damages constitutes a reasonable attempt to compensate  
11 plaintiffs, not a penalty.

12 We RECOMMEND that Judge Armstrong find that the liquidated damages  
13 provision at the rate of 10% per month (but not less than \$100.00), with a \$500.00  
14 per occurrence cap, plus interest, constitutes a “reasonable forecast of just  
15 compensation for the harm caused.” *Idaho Plumbers*, 875 F.2d at 217.

16 If plaintiffs are required (by defendant's unresponsiveness) to file a legal  
17 action to collect the delinquency the contract provides that liquidated damages are  
18 to increase to 20%. Blevins Decl., at Ex. C. By the terms of the Trust Agreement,  
19 this 20% liquidated damages provision applies only to “[c]ontributions still unpaid  
20 on the date the legal action is filed.” Blevins Decl., at Ex. C (Trust Agreement) at  
21 15 (emphasis added). Liquidated damages on such contributions would be  
22 mandatory under ERISA. See, *supra*. In light of this limiting language, plaintiffs  
23 do not appear to seek 20% contractual liquidated damages on contributions  
24 delinquent but paid before the legal action was filed. If, however, plaintiffs were to

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1 request liquidated damages at the rate of 20% on such contributions we would  
 2 RECOMMEND that Judge Armstrong deny the request.<sup>8</sup>

3 For these reasons, if the audit reveals that Airteks was delinquent with  
 4 respect to fringe benefit contributions but that Airteks paid those contributions  
 5 before June 24, 2004, we RECOMMEND that Judge Armstrong award liquidated  
 6 damages on these delinquent contributions pursuant to the contract at the rate of  
 7 10% of the delinquent contributions (but not less than \$100.00) with a monthly  
 8 occurrence cap of \$500.00, plus interest.

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10 **d. Recommendation**

11 We RECOMMEND that the District Court order Airteks to pay liquidated  
 12 damages on contributions found delinquent at the conclusion of the audit consistent  
 13 with paragraphs (a)-(c) above.

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15 **D. Attorneys' Fees and Costs**

16 Section 1132(g) of ERISA requires the Court to award plaintiffs "reasonable  
 17 attorney's fees and costs of the action" when plaintiffs obtain a judgment in their  
 18 favor or otherwise obtain the relief sought. 29 U.S.C. §1132(g)(2)(D); *Northwest  
 19 Administrators*, 104 F.3d at 258.

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<sup>8</sup>The submitted Agreement does not identify any additional damages that would be difficult to assess and that would occasion the need for the additional 10%. Moreover, the collective bargaining agreement and the Trust Agreement provide that plaintiffs are entitled to reimbursement of attorneys' fees and other costs. Blevins Decl., at Ex. A (Master Agreement) at 31 (if plaintiffs must consult counsel they are entitled to "reasonable attorneys' fees, auditors' and accountants' fees, court costs and all other reasonable expenses incurred in connection with such suit or claim") and Ex. C (Trust Agreement) at 14. The provision for attorneys' fees and costs appears to capture the obvious additional costs incurred if plaintiffs must file a legal action. At this juncture, there is no indication in the Agreement or supporting declarations about what other (non-obvious) kinds of damages might be occasioned by the need to file a legal action. Nor does the Agreement suggest why any such additional damages would be difficult to assess. Because other, more direct provisions were made for compensation for the bulk of harms intended to be embraced by an additional 10%, in our view, plaintiffs have not yet justified an additional 10% which, based on the evidence before us, would be nothing more than a "penalty."

1 Plaintiffs seek reimbursement of attorneys' fees and costs in the amount  
 2 \$10,437.71. Consolidated Motion at 6; Declaration of Scott M. DeNardo in  
 3 Support of Consolidated Motion for Default Judgment, filed December 23, 2005  
 4 ("Consolidated De Nardo Decl."), at3.<sup>9</sup>

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6 **1. Tasks Conducted and Number of Hours Spent on Those**  
 7 **Tasks**

8 Plaintiffs seek fees in connection with tasks such as drafting and filing the  
 9 complaints, requesting default, and the instant Consolidated Motion. See, Exhibits  
 10 to C04-2531 and C05-1758 DeNardo Decl. and to Consolidated DeNardo Decl.,  
 11 and to October 4, 2005, letter on file in C05-1758.

12 In its Order re Related Motions for Default Judgment, filed December 1,  
 13 2005, this court notified plaintiffs that it was disinclined to recommend that the  
 14 District Court award reimbursement of fees that could have been avoided by  
 15 amending the 2004 complaint for damages rather than filing a separate action for  
 16 an audit in 2005. In response, plaintiffs' counsel eliminated from plaintiffs' fee  
 17 request hours that, in his judgment, were duplicative or otherwise excessive or  
 18 unnecessary. Consolidated De Nardo Decl., at ¶4-5. Accordingly, the instant fee  
 19 request does not seek recovery for all work conducted by counsel in connection  
 20 with both actions.

21 We have reviewed counsel's revised billing statements and RECOMMEND  
 22 that the District court find that the kinds of tasks conducted by counsel were  
 23 reasonably undertaken. We also RECOMMEND that the District Court find that  
 24 counsel expended a reasonable number of hours completing those tasks for which  
 25 compensation is warranted.

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27 <sup>9</sup>See also, C04-2531 Declaration of Scott M. DeNardo in Support of Motion for Entry of  
 28 Default Judgment, filed September 16, 2005 ("C04-2531 De Nardo Decl."); C05-1758  
 Declaration of Scott M. De Nardo in Support of Motion for Default Judgment, ("C05-1758 De  
 Nardo Decl.") at ¶¶2-3; Letter and attachments, filed in C05-1758 on October 4, 2005.

## 2. Hourly Rates

Plaintiffs seek reimbursement of their attorneys' time at the rates of \$185, \$195, and \$225 per hour for Mr. DeNardo, \$215 and \$255 per hour for Mr. Lynn, and \$85 and \$125 per hour for Mr. Lunch, a law clerk. Consolidated DeNardo Decl., at ¶2. Mr. Lunch is a third year law student at Hastings College of the Law and did the same kind of work as would a paralegal. Consolidated DeNardo Decl., at 3; Transcript of September 28, 2005, hearing.

Mr. De Nardo's and Mr. Lynn's billing rates are commensurate with the prevailing market rate in the Bay Area for lawyers of counsel's skill and experience doing the kind of work these matters involved. We RECOMMEND that Judge Armstrong approve these hourly rates.

When we turn to the rates charged for work by Mr. Lunch, the paralegal, we confront a slightly more complicated situation. Plaintiffs seek reimbursement for paralegal work at two different rates: \$85 per hour and \$125 per hour. The \$85 per hour figure is within the range of reasonable market rates in the Bay Area for work by a paralegal in a setting like this. It follows that we RECOMMEND that Judge Armstrong approve plaintiffs' request for compensation for the hours devoted to this matter by Mr. Lunch that were billed at \$85 per hour. However, plaintiffs have failed to justify the \$125 per hour rate for the remainder of the work done by Mr. Lunch. Having reviewed requests for fees in many cases of this kind, the court is well-positioned to take judicial notice of the fact that the going local market rate for work of this kind by paralegals does not exceed \$95 per hour. We therefore RECOMMEND that Judge Armstrong approve compensation at a rate of \$95 per hour for those paralegal hours for which plaintiffs seek compensation at \$125 per hour. If Judge Armstrong accepts this recommendation, she will reduce plaintiffs' fees by \$183.00 – as Mr. Lunch billed 6.1 hours at the \$125 per hour rate.

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### 3. Costs

2 Plaintiffs also seek costs in the amount of \$596.71.<sup>10</sup> Consolidated DeNardo  
3 Decl., at 4 and 5. Plaintiffs' costs consist of this Court's filing fee, the cost of  
4 service of each Summons and Complaint and other papers filed in this action,  
5 photocopies and postage. See, all De Nardo Declarations and exhibits thereto. The  
6 items for which reimbursement is sought constitute taxable costs and/or out-of-  
7 pocket expenses normally chargeable to the client. Civil L.R. 54-3. *Accord,*  
8 *Harris v. Marhoefer*, 24 F.3d 16 (9th Cir. 1994) (fee award under 42 U.S.C.  
9 §1988). The amounts expended were reasonable. We, therefore, RECOMMEND  
10 that Judge Armstrong grant plaintiffs' request for costs in the amount \$596.71.

## 4. Recommendation

13 For the reasons set forth above, if Judge Armstrong adopts this court's  
14 recommendation to enter judgment in favor of plaintiffs on their claim for unpaid  
15 contributions, we RECOMMEND that Judge Armstrong award plaintiffs costs and  
16 fees in the amount \$10,254.71.<sup>11</sup>

## **E. Post judgment interest**

19 In their Consolidated Motion plaintiffs seek post judgment interest from  
20 August 20, 2005. Consolidated Motion at 5. However, plaintiffs set forth no  
21 authority or evidence that would support a finding that they are entitled to post-  
22 judgment interest, or if so, the rate to which they are entitled. Moreover, there is no  
23 basis for a finding that post-judgment interest should accrue from August 20, 2005.

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27       <sup>10</sup>This amount does not include costs that counsel, in the exercise of his billing judgment,  
eliminated from the fee request. Consolidated DeNardo Decl., at 4.

<sup>28</sup> <sup>11</sup>The total sought (\$10,437.71) minus \$183.00 for the reduction to Mr. Lunch's billing rate.

1 Plaintiffs have opted not to pursue post-judgment interest at this time. See,  
 2 Transcript of January 18, 2006, hearing. By doing so, plaintiffs do not waive their  
 3 right to seek post-judgment interest at a later date. *Id.*

4 We RECOMMEND that the District Court not address at this time whether  
 5 plaintiffs are entitled to post-judgment interest and, if so, the amount. We also  
 6 RECOMMEND that Judge Armstrong not preclude plaintiffs from requesting post-  
 7 judgment interest after Judge Armstrong enters a final judgment.

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9 **III. Conclusion**

10 For the reasons stated above, we RECOMMEND that Judge Armstrong enter  
 11 judgment in plaintiffs' favor and against Airteks for unpaid contributions known to  
 12 be delinquent at this time, interest through August 20, 2005, liquidated damages,  
 13 attorneys' fees and costs in the amount \$30,502.58 plus interest from August 21,  
 14 2005, through the date of judgment according to proof. Additionally, we  
 15 RECOMMEND that the monetary judgment be entered in favor of U.A. Local 342  
 16 Joint Labor-Management Committee and that the Court order the JLM to distribute  
 17 recovered sums pursuant to the Joint Services Agreement.

18 We further RECOMMEND that Judge Armstrong enter an order compelling  
 19 Airteks to submit to an audit for the purpose of determining the amount of fringe  
 20 benefit contributions owed for the period from February 20, 2002, through the  
 21 present, and to provide relevant records requested by the auditor, including, but not  
 22 limited to, Airteks' monthly reports for June, August, November and December  
 23 2003 as well as for 2004 and 2005.

24 Following completion of an audit procedure in which Airteks is permitted to  
 25 participate, we RECOMMEND that Judge Armstrong enter judgment by default in  
 26 favor of plaintiffs and against Airteks for unpaid contributions as determined by the  
 27 audit, interest at the rate of 12%, and statutory and/or contractual liquidated  
 28 damages according to proof.

We further RECOMMEND that Judge Armstrong decline to enter judgment as to Jerome Bohland, individually, at this time.

A copy of this court's Proposed Judgment is attached hereto.

**The Court ORDERS plaintiffs to serve a copy of this Report and  
Recommendation on defendants immediately.**

IT IS SO REPORTED AND RECOMMENDED.

Dated: January 18, 2006

/s/ Wayne D. Brazil  
WAYNE D. BRAZIL  
United States Magistrate Judge

Copies to:  
Plaintiffs with direction to serve defendants,  
SBA, wdb, stats